88 FLRR 1-1077

Department of Health and Human Services, Health Resources and Services Administration, Oklahoma City Area, Indian Health Service, Oklahoma City, OK and Oklahoma Area Indian Health Service Council, NFFE

Federal Labor Relations Authority

6-CA-60184; 31 FLRA No. 33; 31 FLRA 498

February 23, 1988

Judge / Administrative Officer

Before: Calhoun, Chairman; McKee, Member

Affirmed at 89 FLRR 1-8037, 88-1304 (D.C. Cir. 09/15/89)

Related Index Numbers

44.3651 Subjects of Bargaining, Conditions of Employment, Work Rules, Safety and Health Standards, Smoking Rules

44.5222 Subjects of Bargaining, Management Rights, Title VII/Civil Service Reform Act of 1978, Section 7106(b)(1), Technology/Methods/Means of Performing Work

72.611 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Indicia of Change

74.32 Unfair Labor Practice Remedies, Types of Orders, Status Quo Ante

Case Summary

THE EMPLOYER SHOULD HAVE BARGAINED OVER THE UNION'S SMOKING POLICY PROPOSALS. The union alleged that the employer violated 5 USC 7116(a)(1) and (5) by unilaterally instituting a smoke-free working environment. The FLRA found that the initiation of a smoke-free environment was not an exercise of management's statutory right to determine the methods and means of performing work. The agency failed to show that only a total ban on smoking would enable it to achieve its goal of promoting the health of the American Indians it was created to serve. The union's proposals for designated smoking areas and for smoking breaks were negotiable. The proposals relating to snuff and chewing tobacco were also negotiable. A status quo ante remedy was ordered.

Full Text

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's decision filed by the General Counsel. The Respondent filed an opposition to the General Counsel's exceptions.

The issues presented in this case are whether the Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by (1) failing to provide the Charging Party (the Union) with adequate notice and an opportunity to bargain on the Respondent's decision to establish an area-wide, smoke-free environment policy and/or an opportunity to bargain on the impact and implementation of the decision; and (2) unilaterally implementing the policy of Oklahoma City Area facilities

The Judge found that the Respondent's decision to establish a smoke-free environment concerned the technology, methods and means to be used in carrying out its mission under section 7106(b)(1) of the Statute and, therefore, that the Respondent was not obligated to negotiate with the Union concerning its decision. The Judge further found that the Respondent did not refuse to bargain with the Union concerning the impact and implementation of the decision. The Judge concluded that the Respondent did not commit an unfair labor practice.

For the reasons stated below, we find that the Respondent violated sections 7116(a)(1) and (5) of the Statute by refusing to bargain over the change in its smoking policy, and by unilaterally implementing the new policy and failing to give adequate notice to the Union of the impending change in policy.

II. Facts

The Union is the exclusive bargaining representative of a unit of about 1,000 employees in the Respondent's five Oklahoma facilities. The Union is composed of locals which represent the Union and the employees at each facility. Local 414 represents the Union and the employees at the W.W. Hastings Indian Hospital (the Hospital). Mr. Johnny Yahola is President of the Union and Mr. James Duffield is President of Local 414.

The Union and the Respondent are parties to a collective bargaining agreement, which provides in Article IX, Section 3(A)(1) that when the Employer proposes to establish or change a condition of employment which will have an impact on bargaining unit employees and is a mandatory subject of negotiations, a notice will be submitted to the Union President as far in advance as possible and the Union will have 15 days in which to request an opportunity to negotiate. Article IX, Section 3(B)(1) also requires that a notice be sent to the Local President when a hospital or a health center proposes a change applicable to only its employees.

Prior to October 1985, all five of the Respondent's facilities had a smoke policy which allowed employees, patients and visitors to smoke in designated areas.

In January 1985, the Indian Health Service decided to institute a smoke-free environment policy in all its facilities and began planning to initiate such a policy.

In August 1985, the Agency met first with the President of Union Local 414 and then with the President of the Union to discuss the implementation of the smoke-free environment policy at the hospital. At that time, neither was aware of the Respondent's plan to implement the smoke-free environment in all facilities in the Oklahoma City Area.

On September 16, 1985, the local president learned from the Hospital official respondent for developing an implementation plan for the Hospital that the smoke-free policy would be implemented area-wide. On September 17, 1985, the Local President advised the Union President that the smoke-free policy would be implemented area-wide rather than only in the Hospital. The Union President then met with the Hospital Service Unit Director (Unit Director), who confirmed that the policy was to be implemented on an area-wide basis. The Unit Director, when questioned, further advised the Union President that the effective date was October 1, 1985, but that the policy had been implemented on September 16. No further clarification was provided. ALJ at 5-6.

On September 20, 1985, the Union sent a letter to the Respondent requesting negotiations. The Union requested bargaining on the substance of the tobacco-usage policy or, if negotiation on the substance was not permissible under the Statute, impact and implementation bargaining. The Union submitted two proposals for negotiation.

On September 26, 1985, the Respondent informed the Union that the Respondent did not consider the substance of its decision to implement a smoke-free policy to be negotiable, but that it would meet with the Union to discuss the impact and implementation of the policy.

On September 27, 1985, the parties met to negotiate. The Respondent's representatives again indicated that they would not negotiate concerning the decision to implement the new policy, but would bargain concerning impact and implementation. The Union agreed to negotiate on impact and implementation, but expressed concern about the policy itself. The Union also presented the following four proposals for negotiation:

Section 1

The Parties of this Agreement recognize the rights of individuals visiting or working DHHS controlled buildings to an environment reasonably free of pollutants. The Parties also recognize the rights of individuals to smoke provided such action does not endanger property, cause discomfort or unreasonable annoyance to non-smokers.

Section 2

Management will provide designated smoking areas at each Oklahoma Area Indian Health Service Facility. Each designated smoking room will be adequately ventilated.

Section 3

A Union-Management Committee, of equal participants, will be established at each Oklahoma Area Indian Health Service Facility, to address the implementation detail of a new tobacco usage policy. Each local committee will determine the following:

(1) The frequency and length of smoking breaks for Bargaining Unit employees:

(2) The number, size and location of designated smoking areas.

Failure to reach agreement on these items will be subject to formal negotiation at the individual Bargaining Units.

Section 4

The current smoking policy at each facility shall remain in effect pending an agreement on implementation of a new tobacco usage policy.

The Union stressed the nature and severity of the impact of the new non-smoking policy on employees. The Union also proposed that implementation of the policy be delayed until January 1, 1986. The Respondent rejected this proposal, but indicated that it would accept a substantially shorter transition period. After further discussion, the Respondent informed the Union that it would not consider the Union's proposals because they were nonnegotiable. Toward the end of this session, the parties decided they were at impasse.

On October 4, 1985, the parties met with a mediator. The Union submitted another proposal which was a slightly altered version of its second submission. The Respondent refused to negotiate on that proposal. The Union also reiterated its request for a 90-day extension period to monitor the effect of designated smoking areas and indicated that if the designated areas did not work, the Union would accept the smoke-free environment policy. The Respondent asserted that only a 45-day period was acceptable. The Union maintained that 45 days was not sufficient time for monitoring the designated areas.

The Respondent's representative informed the Union that because the parties had been unable to reach agreement on the impact and implementation of the smoke-free environment policy, he was recommending that the Hospital proceed with full implementation of the policy in that facility and that the Area Director proceed to implement the policy in the other facilities without further notification to the Union. By letter dated October 9, 1985, the Respondent informed the Union that the decision to implement the smoke-free environment policy in all hospitals and clinics was nonnegotiable and, therefore, that any Union proposal which provided for continued smoking in any of those facilities was considered nonnegotiable.

On October 7, 1985, the smoke-free/tobacco-free policy was implemented at the Hospital. As a result, the employees no longer are permitted to smoke or use tobacco products within the facility but instead are required to go outside to smoke or use tobacco. The policy was later implemented in other facilities in the area. On October 23, 1985, a smoke-free/tobacco-free policy was announced in the Oklahoma City Area office, effective January 1, 1986. On January 2, 1986, a ban on smoking and tobacco usage was announced in the Pawnee facility, effective retroactive to October 1, 1985. The smoke-free policy was announced on January 27, 1986, at the Lawton facility and became effective in March 1986. A smoke-free policy was implemented at the Clinton facility on February 17, 1986; however, that policy provided for a designated smoking area pursuant to an agreement reached between management and the local union. ALJ at 10-11.

III. Administrative Law Judge's Decision

The Judge found that a smoking policy is a condition of employment, citing the Authority's decision in National Association of Government Employees, Local R14-32 and Department of the

Army, Fort Leonard Wood, Missouri, 26 FLRA 593 (1987) (Fort Leonard Wood). However, the Judge further found that unlike Fort Leonard Wood, in which the Authority found the union's proposals to be negotiable, the Respondent's decision to have a smoke-free environment in Indian hospitals was not negotiable.

The Judge reasoned that because one of Respondent's purposes is to maintain and improve the health of the American Indian people, the decision to have a smoke-free environment was a decision as to the technology, methods and means of performing work within the meaning of section 7106(b)(1). He concluded that the Respondent was, therefore, not required to negotiate about its decision to institute a smoke-free environment and to ban smoking at its health facilities. The Judge distinguished Fort Leonard Wood on the basis that the smoking policy in that case involved the health and comfort of employees and that the work or duty of the agency did not involve improving the health of the public.

The Judge also found that the Respondent did not refuse to bargain regarding the impact and implementation of the smoke-free policy. The Judge noted that the parties had two bargaining sessions and that although the Union requested to bargain about impact and implementation, as well as about the decision itself, negotiations broke down when the Respondent refuse to bargain about the underlying decision or to reassess it. The Judge found that the Union did not then attempt to pursue bargaining on impact and implementation. The Judge found that the Union's proposal to delay implementation of the policy was not aimed at phasing in implementation but, rather, at postponing implementation to give the Respondent an opportunity to decide not to implement the policy.

The Judge also noted that the tobacco-free policy implemented at the Hospital was a broader policy than the area smoke-free policy. The Judge found that the tobacco-free policy was local and that under the parties' collective bargaining agreement, Local 414 was the appropriate entity to bargain on it. The Judge found further that there was no showing that the Hospital management ever refused to bargain about including snuff and chewing tobacco in the policy and, further, that those items were included at the suggestion of the Local President. The Judge determined that he did not need to decide whether a policy precluding the use of snuff and chewing tobacco was negotiable inasmuch as the parties did not argue this issue.

As to whether the Union was notified of the new policy too late to bargain on impact and implementation, the Judge concluded that bargaining took place before the policy was actually instituted and that the Union did not press its impact and implementation proposals before the parties broke off bargaining. The Judge concluded that the Union had sufficient notice of the smoke-free policy before it was instituted to permit the Union to request and bargain on impact and implementation matters.

The Judge concluded that the Respondent did not violate sections 7116(a)(1) and (5) of the Statute and recommended that the Authority dismiss the complaint.

IV. Positions of the Parties

The General Counsel contends that the Respondent violated the Statute by refusing to negotiate about its decision to institute a smoke-free and tobacco-free environment in its Oklahoma City Area facilities. The General Counsel argues that the Judge erred in finding that the decision to establish a smoke-free environment involved the technology, methods and means of performing work because the Respondent failed to establish the required nexus between the accomplishment of its mission and the total ban on smoking within its facilities. Further, the General Counsel argues that the decision in Fort Leonard Wood, holding that a smoking policy in the workplace was a negotiable condition of employment, is controlling in the present case. The General Counsel contends that the Respondent violated sections 7116(a)(1) and (5) by unilaterally implementing the new smoking policy without giving the Union an opportunity to negotiate.

The General Counsel also contends that the tobacco-free policy was instituted area-wide and not just at one facility as alleged by the Respondent. Accordingly, the General Counsel maintains that the Respondent was obligated to negotiate with the Union at the Council level rather than the local level. The General Counsel argues that the Judge erred both in finding that the tobacco-free policy was to be instituted only at the Hospital and in not finding that the portion of the policy dealing with snuff and chewing tobacco was negotiable. Consequently, the General Counsel contends that the Respondent also violated sections 7116(a)(1) and (5) of the Statute by its failure and refusal to negotiate concerning the snuff and chewing tobacco aspects of the tobacco-free policy.

The General Counsel further contends that the Respondent violated sections 7116(a)(1) and (5) of the Statute by failing to provide adequate and specific notice to the Union concerning the tobacco-free policy.

The General Counsel also alleges that the Judge erred in his failure to find that the Union's proposals were negotiable. Consequently, the General Counsel contends that the Respondent's action in refusing to bargain on the proposals constitutes a further violation of sections 7116(a)(1) and (5) of the Statute.

The Respondent, in its opposition to the General Counsel's exceptions, contends that the record fully supports the Judge's conclusions and decisions.

The Respondent points out that the collective bargaining agreement involved in the case did not become effective until August 20, 1985. The Respondent argues that prior to that date, the procedure for notifying the Union was through the Local President. The Respondent maintains that Mr. Duffield was notified of the new smoke-free environment policy on August 12, 1985. The Respondent contends that the notice to Mr. Duffield, who is also a Vice President of the Union, constituted sufficient notice. The Respondent further contends that the record indicates that Mr. Yahola was informed in the Spring of 1985 of the pending implementation of the policy at the W.W. Hastings Indian Hospital.

V. Analysis and Conclusion

The issues presented are: (1) whether the Respondent met its obligation under the Statute to bargain concerning its decision to establish a smoke-free environment in its facilities; and (2) whether the Respondent provided the Union with adequate notice of its decision to establish the policy.

A. The Proposals Do Not Interfere with the Agency's Right to Determine the "technology, methods, and means of performing work" under Section 7106(b)(1)

The Respondent contended, and the Judge found, that based on existing studies and research, the Respondent's decision to establish a smoke-free environment at its facilities would further the Respondent's basic mission to improve and maintain the health of the American Indian people. Thus, the Judge concluded that the Respondent's decision to establish a smoke-free environment constituted a decision as to the "technology, methods, and means of performing work" within the meaning of section 7106(b)(1) of the Statute. Therefore, the Judge found that the Respondent was not obligated to negotiate about its decision to institute a smoke-free environment at its facilities. ALJ at 13.

Proposals concerning the implementation of an agency's smoking policy involve conditions of employment. See National Treasury Employees Union and Internal Revenue Service, Indianapolis District, 30 FLRA 32 (1987); American Federation of Government Employees, Local 2324, AFL-CIO and Department of the Army Headquarters, 1st Infantry Division, Fort Riley, Kansas, 27 FLRA 33 (1987); Fort Leonard Wood, 26 FLRA 593 (1987). Compare American Federation of Government Employees, AFL-CIO, Local 1808 and Department of the Army, Sierra Army Depot, 30 FLRA No. 137, slip op. at 27-28 (1988) (Provision 15). Therefore, the Union's proposals are negotiable unless they conflict with management's rights. The Respondent alleges and the

Judge found that the Respondent's smoking policy constituted an exercise of its right to determine the "technology, methods, and means of performing work" within the meaning of section 7106(b)(1). We disagree.

In order to sustain a claim that a proposal concerning conditions of employment is negotiable only at the election of management because it directly interferes with management's right to determine the "technology, methods, and means" used in performing work, an agency must establish: (1) the technological relationship of the proposal to accomplishing or furthering the performance of the agency's work; and (2) how the proposal would interfere with the purpose for which the technology was adopted. American Federation of Government Employees, AFL-CIO, National Council of Social Security Field Office Locals and Department of Health and Human Services, Social Security Administration, 24 FLRA 842, 846-47 (1986). In the context of section 7106(b)(1), "means" refers to any instrumentality, including an agent, tool, device, measure, plan or policy used by an agency for the accomplishing or furthering of the performance of its work. National Federation of Federal Employees, Local 15 and Department of the Army, U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois, 30 FLRA No. 115, slip op. at 27 (1987). "Method" refers to the way in which an agency performs its work. National Federation of Federal Employees, Local 541 and Veterans Administration Hospital, Long Beach, California, 12 FLRA 270 (1983). The term "performing work" which appears in section 7106(b)(1) of the Statute is intended to include those matters which directly and integrally relate to the Agency's operations as a whole. Federal Employees Metal Trades Council, AFL-CIO and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California and American Federation of Government Employees, Local 1533, 25 FLRA 465 (1987).

The Respondent has demonstrated that smoking can have deleterious effects on the American Indian people. However, the Respondent has not shown that without a total ban on smoking in its facilities it will be unable to achieve its objective of promoting American Indian health. That is, even assuming that the objective of the Agency in totally restricting smoking in its facilities is related to the "technology, methods, and means of performing work," the Agency has not shown how the proposals in this case would interfere with the purpose for which the Agency's smoking restrictions were adopted. The Union's proposals would require that designated smoking rooms which are adequately ventilated be established at each of the Respondent's facilities; that each facility establish a Union-Management Committee to address the details of implementing the policy, including various aspects of smoking breaks and designated smoking areas; and that the previous smoking policy remain in effect pending agreement on implementation of the new tobacco usage policy. there is nothing in the record which indicates that the proposals would interfere with the Agency's objective.

As noted above, we have found similar proposals involving the implementation of an agency smoking policy to be negotiable. Further, we have found proposals involving the scheduling of breaks and establishment of joint union-management committees also to be negotiable. See American Federation of Government Employees, Local 3342, AFL-CIO and Department of Health and Human Services, Social Security Administration, 19 FLRA 1100 (1985); Overseas Education Association and U.S. Department of Defense Dependents Schools, 28 FLRA 700 (1987), petition for review filed sub nom. Overseas Education Association, Inc. v. FLRA, Nos. 87-1468 and 87-1575 (D.C. Cir. Sept. 8, 1987). Accordingly, we find that the Union's proposals regarding the Respondent's new tobacco usage policy are negotiable. Although the Judge made no finding as to whether the prohibition on the use of snuff and chewing tobacco in the Respondent's policy was negotiable, we find no basis on which to distinguish between the use of these tobacco products and other

products encompassed by the Agency's policy. Therefore, we find that the Union's proposals are also negotiable to the extent that they concern the use of snuff and chewing tobacco.

Consequently, we conclude that the Respondent violated sections 7116(a)(1) and (5) of the Statute by refusing to bargain regarding the Union's proposals. In reaching this conclusion, we disagree with the Judge that the Respondent did not refuse to bargain on the Union's impact and implementation proposals because the parties broke off bargaining without the Union "pressing" its impact and implementation proposals. ALJ at 15. It is clear from the record that the Respondent refused to bargain on the Union's proposals because they provided for some continued, although limited, use of tobacco products in its facilities.

Further, we find that Respondent also violated sections 7116(a)(1) and (5) of the Statute by implementing the new area-wide policy without bargaining with the Union over its proposals. See Veterans Administration, Veterans Administration Regional Office, (Buffalo, New York), 10 FLRA 167 (1982).

B. Notice

The General Counsel alleges that the Respondent violated sections 7116(a)(1) and (5) of the Statute by failing to give adequate and appropriate notice to the Union concerning the policy change. The Respondent contends that the President of Local 414 and Vice President of the Union, was notified on August 12, 1985, about the impending change in the smoking policy. Further, the Respondent contends that the parties' collective bargaining agreement regarding notice to the Union did not go into effect until August 20, 1985, and that the procedure for notifying the Union before that date was to notify a Local President. The Respondent also argues that the President of the Union was advised of the impending change of the smoking policy at the W.W. Hastings Indian Hospital in the Spring of 1985.

The Authority has held that an agency may not make changes affecting conditions of employment without first notifying the exclusive bargaining representative of the affected employees and affording it an opportunity to bargain. See Department of Health and Human Services, Social Security Administration, Field Assessment Office, Atlanta, Georgia, 11 FLRA 419 (1983); San Antonio Air Logistics Center (AFLC), Kelly Air Force Base, Texas, 5 FLRA 173 (1981). The record in this case reflects that prior to September 16, 1985, the Union officials were aware only of the impending changes at the W.W. Hastings Indian Hospital. As the Judge found, they were not aware that the changes were to be made at any other area facility before that date. ALJ at 14 n.13. Accordingly, the Respondent's argument that the Union had been informed of the area-wide application of the policy through Mr. Duffield and Mr. Yahola is without merit. It was not until September 16, 1985, that President of the Local was advised that the change was area-wide and he then informed the President of the Union on September 17, 1985. Thus, it is clear that the Respondent never properly advised the Union that the change was going to be area-wide. Accordingly, we find that the Respondent, by its failure to give notice to the Union of the area-wide policy change, violated sections 7116(a)(1) and (5) of the Statute. See Office of the Assistant Secretary of Defense for Public Affairs and Washington Headquarters Services, 19 FLRA 1103 (1985).

C. Remedy

Having concluded that the Respondent committed the unfair labor practice as described above, we turn to the question of the appropriate remedy. The General Counsel requests a status quo ante remedy. We find that such a remedy is warranted in order to effectuate the purposes and policies of the Statute. Consistent with our decision in Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 30 FLRA 697 (1987), we find that a status quo ante remedy is appropriate where, as here, management has unilaterally changed a negotiable condition of employment. Effectuation of

the purposes and policies of the Statute require a return to the status quo ante, in order not to render meaningless the obligation to bargain. Accordingly, we will require the Respondent to, among other things, rescind the implementation of the smoke-free/tobacco-free policy until bargaining with the Union is completed.

Order

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Department of Health and Human Services, Public Health Service Health Resources and Services Administration, Oklahoma City Area, Indian Health Service, Oklahoma City, Oklahoma shall:

1. Cease and desist from:

(a) Unilaterally establishing a new tobacco usage policy in the Oklahoma City Area without providing the Oklahoma Area Indian Health Service Council, National Federation of Federal Employees (the Union), the exclusive representative of a unit of its employees, the opportunity to bargain, to the extent consistent with law and regulations, on the decision to effectuate such a policy.

(b) Failing to provide timely notice to the Union of its intent to change the tobacco usage policy in the Oklahoma City Area.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind the new tobacco usage policy implemented at facilities in the Oklahoma City area.

(b) Notify the Union of any intention to change the tobacco usage policy at facilities in the Oklahoma City Area and, on request, bargain with the Union, to the extent consistent with law and regulation on any decision to change the policy.

(c) Post at its facilities in the Oklahoma City Area copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Area Director, and shall be posted and maintained for 60 consecutive days in conspicuous places, including all bulletin boards and places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

Issued, Washington, D.C., February 23, 1988.

Jerry L. Calhoun, Chairman Jean McKee, Member FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally establish a new tobacco usage policy at facilities in the Oklahoma City Area without providing the Oklahoma Area Indian Health Service Council, National Federation of Federal Employees (the Union) the opportunity to bargain, to the extent consistent with law and regulation on the decision to effectuate such a change.

WE WILL NOT fail to provide timely notice to the Union of any intent to change the tobacco usage policy at facilities in the Oklahoma City Area.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the tobacco usage policy implemented at facilities in the Oklahoma City area.

WE WILL notify the Union of any intention to change the tobacco usage policy at facilities in the Oklahoma City Area, and upon request, bargain with the Union to the extent consistent with law and regulations, on any decision to change the policy.

_____

(Activity)

Dated:_____

By:_____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region VI, Federal Labor Relations Authority, whose address is: Federal Office Building, 525 Griffin Street, Suite 926, Dallas, Texas 75202 and whose telephone number is: (214) 767-4996.

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. 7101 et seq., 92 Stat. 1191 (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, 2410 et seq.

A charge was filed on December 16, 1985, and amended on March 14, 1986, by Oklahoma Area Indian Health Council, National Federation of Federal Employees, (hereinafter called the Union and the Council), against Department of Health and Human Services, Public Health Service, Health Resources and Services Administration Oklahoma City Area, Indian Health Service, Oklahoma City, Oklahoma, (hereinafter called Respondent). Pursuant to the amended charge the General Counsel of the FLRA, by the Director of Region VI, issued a Complaint and Notice of Hearing on March 17, 1987, alleging that Respondent violated Sections 7116(a)(1) and (5) of the Statute by unilaterally establishing a new tobacco usage policy at W.W. Hastings Indian Hospital without providing the Union the opportunity to negotiate over the change and/or the procedures to be observed in effecting the change and appropriate arrangements for employees adversely affected by the change. Respondent filed an Answer denying it had violated the Statute.

A hearing was conducted before the undersigned in Muskogee, Oklahoma. The Respondent, Union and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed and have been fully considered.*1

Based on the entire record in this matter, my observation of the witnesses and their demeanor, and my evaluation of the record, I make the following:

Findings of Fact

The Indian Health Service, hereinafter referred to as IHS, is responsible for administering a national program for improving the health of approximately 950,000 Indians.

The Union is the collective bargaining representative for a unit of about 1,000 employees employed in Respondent's five Oklahoma facilities.*2 The Council is composed of locals which represents the Union at each facility. Local 414 represents the Council, and the employees, at the W.W. Hastings Indian Hospital. Johnny Yahola is President of the Council and James Duffield is President of Local 414. Both Duffield and Yahola work at the W.W. Hastings Indian Hospital.

The Council and Respondent have been, at all times material, covered by a collective bargaining agreement which provides in Article IX, Section 3, in part:

Section 3

When the employer proposes to establish or change a condition of employment which will have an impact on bargaining unit employees and is mandatory subject of negotiations, the following procedures shall apply.

A. Changes Applicable to the Entire Bargaining Unit

1. A notice will be submitted to the Union president as far in advance as possible of a proposed change. The Union will have fifteen (15) days in which to request an opportunity to negotiate. Such request will contain the initial contract proposal which the Council wishes to negotiate.

B. Changes Applicable to a Component of the Bargaining Unit (Hospital or Health Center thereof):

1. A notice will be sent to the Local Union President, or designee, by the Service Unit Director, or designee, when a hospital or Health center proposes a change applicable to only its employees.

Prior to October 1985, all five of Respondent's facilities had a smoking policy which allowed employees, patients, and visitors to smoke in designated areas. All lounges were designated smoking areas. The use of snuff or chewing tobacco was also allowed within these facilities. The smoking policy at W.W. Hastings Indian Hospital was posted on the main bulletin board in the hospital and provided for smoking in designated areas.

As early as January 25, 1985, the IHS began planning to initiate a smoke free environment in all its facilities and in early 1985, the IHS decided to institute a smoke free policy system-wide.*3 In spring 1985, Danny Whitekiller, Service Unit Director, W.W. Hastings Indian Hospital, Tahlequah, Oklahoma, attended a Service Unit Directors meeting. During this meeting, the plan to institute a smoke free policy in all of Respondent's Oklahoma facilities was discussed. During this meeting, or during an April 1985 Service Unit Directors meeting, Whitekiller was told by H.C. Townsley, M.D., Area Director, that the smoke free policy was to be area-wide. Townsley made it clear to Whitekiller and the other Service Unit Directors that the Oklahoma City Area facilities were going to eventually have a smoke free policy. Townsley did, however, leave the dates of such implementation open to the Service Unit Directors.

A timetable was set for implementing the policy, with October 1, 1985, as the final date by which most facilities should be smoke free. Whitekiller then decided to implement the smoke free policy at the W.W. Hastings Indian Hospital. Whitekiller appointed a Health Promotion and Disease Prevention Committee, with Ms. Bobbie Ruth Christie, R.N., as Chairperson, to develop an implementation plan.

On August 6-8, 1985, Christie attended an Oklahoma Area workshop where the goals and objectives, research and other materials concerning the IHS smoke free initiative were discussed. Dr. Leland Fairbanks, project officer, and Dr. Bergeisan, task force chairperson, were among the presenters. Subsequent to the workshop, on or about August 12, 1985, Christie met with Duffield and discussed with him the IHS initiative and the responsibility of the Health Promotion and Disease Prevention Committee to develop an implementation plan for smoke free environment at the W.W. Hastings Indian Hospital. During this meeting Christie presented Mr. Duffield with a binder of material on the IHS smoke free environment which had been handed out at the Oklahoma Area conference on the smoke free environment initiative. When questioned by Duffield as to why this policy was only being implemented at the W.W. Hastings Indian Hospital, Christie advised him that it was being "done in other areas of Indian Health." Christie stated that during the following two months, Duffield was invited to, and did attend, the Committee meetings.

On August 21, 1985, Yahola was informed by Duffield that there would be change in the Tahlequah facility's smoking policy. Duffield indicated to Yahola that Whitekiller had approached him and asked him to review a proposed draft of a new smoking policy and had wanted the local union to provide some input. Yahola suggested that the Local devise a survey to gain employee input. At the time,

neither Yahola nor Duffield was aware of the plan to implement the smoking policy area-wide.

As a result of Duffield's suggestion to the Committee, the smoke free policy was changed to a tobacco usage policy which banned not only smoking, but also the use of all tobacco products. It also accepted the recommendation from Yahola to conduct a survey of employees. In early September 1985, Duffield also volunteered to participate in the publicity campaign by making an announcement at the Rodeo Program in which he was participating.

On September 17, 1985, Yahola became aware of the area-wide application of the no smoking policy. On that date, Duffield present Yahola with a two-page memo entitled "Tobacco Usage Policy." Duffield told him that he had been informed by Christie, the day before, that the policy was area-wide. To confirm this, Yahola met with Whitekiller and asked him if the policy was indeed area-wide. Whitekiller stated that it was an area-wide policy. Yahola then asked when the policy went into effect and Whitekiller responded October 1, 1985, but said it had been implemented on September 16. Yahola asked for a clarification, but did not receive it.*4 He told Whitekiller he would get back to him on the matter.

On September 20, 1985, by certificate mail, Yahola sent a letter requesting negotiations to Woodrow W. Kinney, Labor Relations Specialist, Oklahoma City Area Indian Health Service. Specifically, Yahola wrote:

The Oklahoma Area Indian Health Service Council of the National Federation of Federal Employees understands that a "Smoke Free Working Environment" policy is to be implemented at each Oklahoma City Area Indian Health Service Facility.

In accordance with 5 U.S.C., section 7114, we feel that negotiations on the substance of a tobacco usage policy are appropriate. In the event that negotiations on substance are not permissible under the statute, the NFFE Oklahoma Area IHS Council requests, in the alternative, "impact and implementation" bargaining as provided for in Article IX, section 3(A)-Mid-Term Bargaining, of our Negotiated Agreement.

Attached to the letter were two proposals:

SECTION-1

The parties of this Agreement recognize the rights of individuals visiting or working DHHS controlled buildings to an environment reasonably free of pollutants. The Parties also recognize the rights of individuals to smoke provided such action does not endanger property, cause discomfort or unreasonable annoyance to non-smoker.

SECTION-2

Smoking or the use of any form of tobacco is permitted in designated areas at each Oklahoma IHS facility, except in areas clearly marked as "NON-Smoking," such as oxygen storage docks, fuel storage tanks, and areas containing inflammable material.

On September 26, 1985, Thomas C. Long, Regional Labor Relations Specialist, responded to Yahola's September 20, 1985 letter by indicating that while management did not consider the substance of management's decision to implement a smoke free policy to be negotiable, management would be agreeable to meeting with Yahola to discuss the impact and implementation of the policy.

On September 27, 1985, the parties met at the W.W. Hastings Indian Hospital to negotiate. Representing managering were Long; Bill McKee, Deputy Administrator for the W.W. Hastings Indian Hospital; Woodrow Kinney, Oklahoma City Area Labor Relations Specialist; and Jody McClarey, Personnel Assistant. Representing the Union were Yahola, Duffield, and two nurses from the Hospital, Diane Jones and Melvina Stevens. The management representatives indicated that they would not negotiate concerning the decision itself but would bargain concerning impact and implementation of the decision. The Union agreed but expressed some concern about the smoke free policy. The parties discussed, inter alia, disciplining employees who violated the policy, the carrying of a beeper, etc.

Yahola then presented to management a second set of proposals. This set of proposals provided for designated smoking areas at each Oklahoma City Area Indian Health Service facility and provided that each facility negotiate at the local level the specifics concerning breaks and designated area. The proposals were:

SECTION-1:

The parties of this Agreement recognize the right of individuals visiting or working DHHS controlled buildings to an environment reasonably free of pollutants. The Parties also recognize the rights of individuals to smoke provided such action does not endanger property, cause discomfort or unreasonable annoyance to non-smoker.

SECTION-2:

Management will provide designated smoking areas at each Oklahoma Area Indian Health Service Facility. Each designated smoking room will be adequately ventilated.

SECTION-3:

A Union-Management Committee, of equal participants will be establishe[d] at each Oklahoma Area Indian Health Service Facility, to address the implementation details of a new tobacco usage policy. Each local committee will determine the following:

1. The frequency and length of smoking breaks for Bargaining Unit Employees;

2. The number, size, and location of designated smoking area.

Failure to reach agreement on these items will be subject to formal negotiation at the individual Bargaining Units.

SECTION-4:

The current smoking policy at each facility shall remain in effect peding [sic] a agreement on implementation of a new tobacco usage policy.

After receiving the proposals, Respondent's representatives indicated that they would discuss the proposals and consider them. The Union's representatives then attempted to impress upon Respondent the nature and severity of the impact of the new nonsmoking policy on employees and patients. The Union proposed that implementation be delayed until January 1, 1986, so as to allow the parties an opportunity to monitor the effects of the new policy.*5 Management rejected this proposal, but indicated it would accept a shorter transition period. The parties broke for lunch around 11:30 a.m. and returned for an afternoon session. Respondent presented counter proposals. The Union advised the Respondent that they (the Union) had already called the Federal Mediation and Conciliation Service and would not discuss Respondent's counter proposal. The parties decided they were at impasse.

On October 4, 1985, the parties met with Mediator Bud Libby. In attendance for Respondent were Long and Kinney.*6 In attendance for the Union were Yahola, Jones, Stevens, and Joe Grayson, a member of the Union. At this session, the Union submitted a third proposal which was a slightly altered version of their second proposal. Libby presented the new proposal to management, who refused to negotiate on the proposal because they "believed highly in their smoke free environment." Toward the end of this session, Long and Yahola reiterated his request for a 90-day extension period to monitor the designated smoking areas and if the designated areas didn't work the Union "would accept the smoke free environment." Long reasserted Respondent's position that only a 45-day period was acceptable, to which Yahola responded that 45 days was not sufficient a time frame for monitoring the designated areas. Long reiterated that a longer time frame was unacceptable. Yahola then asked Long "[A]re you saying it is nonnegotiable," to which Long responded, "yes." Yahola requested that Long put that in writing and Long told Yahola to put his request in writing. So, on October 4, Yahola submitted to Long a written request that Long put his declaration of nonnegotiability in writing.*7

Also, on October 4, 1985, Long submitted to Yahola a letter which in pertinent part stated:

Due to the fact that the parties have been unable

to reach agreement on the Impact and Implementation of the Smoke Free Environment policy in all Oklahoma City Area Facilities, I am recommending to the Hospital Administrator, W.W. Hastings Hospital, Tahlequah, Oklahoma, that he procede [sic] with full implementation of the policy in that facility. I am recommending to the Area Director, Oklahoma City Area, to procede [sic] at the Employer's discretion to implement the policy in any and all Area facilities without further notification to the NFFE Council. However, if local officials (both management & union) wish to develop a Memorandum of Agreement in accordance with Article IX, Section 3B, of the Agreement, the Employer will have no objection.

In response to Yahola's October 4, 1985 request, by letter dated October 9, 1985, Long stated as follows:

Pursuant to your undated written request submitted to me on October 4, 1985 and pursuant to the provisions of 5 U.S.C. 2424.3, this letter is to serve as the Employer's allegation that the decision to implement a Smoke Free Environment policy in all the hospitals and clinics in the IHS Oklahoma City Area is non-negotiable. Therefore, any union proposl [sic] which provides for continued smoking in any of these facilities is considered non-negotiable.

On October 7, 1985, the smoke free/tobacco free policy was implemented at the W.W. Hastings Indian Hospital. As a result, employees are no longer allowed to smoke or use tobacco products within the facility but, instead, are required to go outside to smoke or use tobacco. Smokers and those using snuff or chewing tobacco are required to go some 20 feet from the building in front of the main entrance to the hospital or the emergency room entrance.

The policy was later implemented area-wide. The smoke free policy was announced on January 27, 1986, at the Lawton facility and became effective in March 1986. On January 2, 1986, Don Louis Tyndall, Service Unit Director, signed a memo banning smoking and tobacco usage in the Pawnee facility effective retroactive to October 1, 1985. On October 28, 1985, H.C. Townsley, M.D., announced a smoke free/tobacco free policy in the Oklahoma City Area Office effective January 1, 1986, which was later clarified as being applicable to all Service Units within the Oklahoma City Area Indian Health Service. A smoke free policy was implemented at the Clinton facility on February 17, 1986, however, it did provide for a designated smoking area pursuant to an agreement reached between management and the local union.

The Indian Health Care Improvement Act, P.L. 94-437, September 30, 1976; 25 U.S.C. 1601 et seq. provides in part:

"The Congress finds that (a) Federal health services to maintain and improve the health of Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, American Indian people" (25 U.S.C. 1601); and

"The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy." (25 U.S.C. 1602).

Discussion and Conclusions of Law

General Counsel of the FLRA contends that Respondent violated Sections 7116(a)(1) and (5) of the Statute*8 by failing to provide the Union with appropriate notice and opportunity to bargain over Respondent's decision to implement an area-wide smoke free policy and/or the procedures to be observed in effectuating this policy and appropriate arrangement for employees adversely affected by the policy at the W.W. Hastings Indian Hospital.

It is clear that a smoking policy in the work place is a condition of employment and has been held by the FLRA, in different circumstances, to be negotiable. National Association of Government Employees, Local R14-32 and Department of the

Army, Fort Leonard Wood, Missouri, 26 FLRA 593 (1987); see also Decision of the Administrative Law Judge in Department of Health and Human Services, Office of Hearing and Appeals, Region I, Boston, Massachusetts, Case No. 1-CA-60076 (April 14, 1987). However, in the subject case, although the smoking policy is a condition of employment as defined in Section 7103(14) of the Statute,*9 the basic decision to have a smoke free environment in the Indian Hospitals is exempted from any obligation to bargain, at the election of management, under 7106(b)(1) of the Statute, which provides, in part:

"(b) Nothing in this section shall preclude any agency and any labor organization from negotiating --

"(1) at the election of the agency, . . . on the technology, methods, and means of performing work; . . ."

In the subject case one of the charges of the IHS is to maintain and improve the health of the "American Indian:" people*10 and the IHS and Respondent reasonably decided, in light of existing studies and research, that a smoke free environment in the IHS Oklahoma City Area health facilities, would further its basic obligation to improve and maintain the health of the Indian people.*11 Thus the decision to have a smoke free environment was a decision as to the technology, methods and means of performing the work of the agency, that is the methods, means, and technology to be utilized in improving and maintaining the health of the Indian people. Accordingly under the provisions section 7106(b)(1) of the Statute Respondent did not have to negotiate about its decision to institute a smoke free environment and to ban smoking in the health facilities.

This case is thus distinguishable from National Association of Government Employees, Local R14-32 and Department of the Army, Fort Leonard Wood, Missouri, supra and Department of Health and Human Services, Office of Hearings and Appeals, Region I, Boston, Massachusetts, supra because in the two cited cases the smoking policy involved solely the health and comfort of employees and possibly some customers, and the work or duty of the activities did not involve improving the health of the public. The smoking policies were not part of the agencies performing its basic work or function, but was an attempt to deal with the comfort and health of employees in the work place.*12

In the subject case, therefore I conclude that Respondent was privileged under section 7106(b)(1) of the Statute to refuse to bargain about its decision to institute a smoke free environment in its Oklahoma City Health facilities*13 and such a refusal did not constitute a violation of sections 7116(a)(5) and (1) of the Statute.

Respondent was, however, obliged to bargain with the Council about the "procedures" to be used in implementing smoke free policy and "arrangements" for employees adversely affected by the smoke free policy.*14 However, the facts of the subject case, when viewed as a whole, established that Respondent did not refuse to bargain with the Council about the impact and implementation of the establishment of the smoke free policy. At the two bargaining meetings on September 27 and October 4 although the Council requested to bargain about impact and implementation of the smoke free policy, as well as about the decision itself, negotiations broke down when Respondent refused to bargain about the underlying decision or to reassess it. The Council did not attempt to then pursue bargaining about impact and implementation, but rather stated that the parties were at impasse. The Council and Respondent, when they spoke in terms of impasse, were apparently using it in its ordinary sense, and not as term of art, or as used in the Statute, because it was concluded they were at impasse after almost no discussion and after Respondent said the decision about the smoke free policy was non-negotiable. There was almost no discussion about the impact and implementation of the smoke free policy and there was no refusal by the Respondent to bargain about the Council's proposals concerning the impact and implementation of the smoke free policy. In this regard the Council's proposal to delay implementation of the policy was aimed not at

phasing in implementation but rather was a way of putting off implementation and giving Respondent an opportunity to change its mind and decide not to implement the policy at all.

Accordingly, I conclude that Respondent did not violate Sections 7116(a)(5) and (1) of the Statute because the record herein does not establish that Respondent refused to bargain about the impact and implementation of the smoke free policy.

General Counsel of the FLRA notes that although Respondent's policy was a smoke free policy, at W.W. Hastings Indian Hospital the policy was a tobacco free policy, which prohibited all tobacco usage, including chewing tobacco and snuff. This was a broader policy than the area wide policy. The record does not establish that representatives W.W. Hastings Indian Hospital refused to bargain about the inclusion of chewing tobacco and snuff in the smoke free policy and further these items were included at Duffield's suggestion. The snuff and chewing tobacco policy was a local one and Local 414 was the appropriate entity to bargain about it under Article IX, Section (3)(B) of the collective bargaining agreement and there is no showing that W.W. Hastings Indian Hospital's management ever refused to bargain about the snuff and chewing tobacco inclusion.*15

Finally General Counsel of the FLRA may argue that the Council received notice of the new policy too late to bargain about the impact and implementation of the policy because some preliminary steps had already been taken to institute the new policy, i.e. new signs painted, etc. Such contention is rejected because, in fact bargaining took place before the policy was actually instituted and in fact the parties broke off bargaining, without the Council having pressed its impact and implementation proposals, before the policy was actually implemented. Further the preliminary steps were minor and could easily have been retracted before the policy went into effect. The record does not establish that any impact and implementation decisions had been irrevocably made by Respondent before the Council or Local 414 knew about the smoke free policy and had an opportunity to request to bargain about the impact and implementation of the smoke free policy. Thus Council did have notice of the smoke free policy sufficiently before it was implemented to request to bargain about the impact and implementation of the policy and Respondent never refused to bargain with the Council about the impact and implementation of the smoke free policy.

In light of all the foregoing I conclude that Respondent did not violate Sections 7116(a)(1) and (5) of the Statute and therefore recommend the Authority issue the following order.

ORDER

The Complaint in Case No. 6-CA-60184 be, and hereby is, dismissed.

SAMUEL A. CHAITOVITZ Administrative Law Judge

Dated: July 23, 1987 Washington, D.C.

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1. General Counsel of the FLRA filed a "Motion to Strike Portions of Respondent's Brief." General Counsel of the FLRA requests that certain portions of Respondent's brief be stricken because they are not supported by the record. General Counsel of the FLRA's Motion is hereby Denied, but of course all findings of fact are based upon the record herein.

2. The five facilities the Oklahoma City Area where the employees work are in Clinton, Lawton, Shawnee and Pawnee, Oklahoma and the W.W. Hastings Indian Hospital in Tahlequah, Oklahoma.

3. This decision by the IHS was based on various decisions of the Surgeon General and various studies that indicated primary smoke (smoke breathed by smokers) and secondary or passive smoke (smoke breathed by non-smokers) were harmful to one's health and were a health hazard. The conclusion that primary and secondary smoke were harmful to health and were health hazards was a reasonable one. For the purpose of this Decision, as discussed later herein, it is not necessary for me to decide if this conclusion by

IHS was, in fact, correct.

4. During August and September 1985, the designated smoking area signs in the Tahlequah facility were being removed and replaced by permanent no smoking signs.

5. It is not clear how the effects of the change were to be monitored if the change was to be postponed during the monitoring process.

6. The parties were in separate rooms.

7. Attached to the Union's request were copies of its second and third proposals.

8. Sections 7116(a)(1) and (5) of the Statute provides:

"(a) For the purpose of this chapter it shall be an unfair practice for an agency --

(1) to interfere with, restrain, or coerce any employee in the exercise by the employees of any right under this Chapter;

. . . .

(5) to refuse to consult or negotiate in good faith with a labor organization or required by this chapter; . . ."

9. Section 7103(14) provides:

"14 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, . . ."

10. See Indian Health Care Improvement Act, 25 U.S.C. 1601.

11. I need not decide whether the determination that a smoke free environment is the only way to eliminate secondary smoke, or if secondary smoke is in fact harmful. It is sufficient that IHS Oklahoma City Area's decision and conclusions were reasonable as to the methods, means and technology it chose to perform its duties.

12. Veterans Administration, Washington, D.C., 24 FLRA 9 (1986) is also inapposite because it deals with a refusal to bargain about precautions nurses may take in handling radioactive material used in treating patients, but does not deal with the appropriate treatment of patients.

13. In so doing I reject Respondent's contention that the Council did not make a timely demand to bargain, as limited by the contract. I conclude that the Council did not learn of Respondent's decision to institute an area wide smoke free policy until September 17, 1985 and Yahola requested to negotiate by letter of September 20, well within the time limits set by in the collective bargaining agreement.

14. Both items will be referred to as the impact and implementation of the change.

15. It was not argued and I need not decide whether a no snuff and chewing tobacco policy would be non-negotiable under Section 7106(b)(1) of the Statute.

